

McNAIR & SANFORD, P.A.

ATTORNEYS AND COUNSELORS AT LAW

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140 EAST BAY STREET
POST OFFICE BOX 1431
CHARLESTON, SC 29402
TELEPHONE 803/723-7831
FACSIMILE 803/722-3227

COLUMBIA OFFICE
NATIONS BANK TOWER
1301 GERVAIS STREET
POST OFFICE BOX 11390
COLUMBIA, SC 29211
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FACSIMILE 803/799-9804

GEORGETOWN OFFICE
121 SCREVEN STREET
POST OFFICE DRAWER 418
GEORGETOWN, SC 29442
TELEPHONE 803/546-6102
FACSIMILE 803/546-0096

GREENVILLE OFFICE
NATIONS BANK PLAZA
SUITE 601
7 NORTH LAURENS STREET
GREENVILLE, SC 29601
TELEPHONE 803/271-4940
FACSIMILE 803/271-4015

RALEIGH OFFICE
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ONE EXCHANGE PLAZA
SUITE 810
POST OFFICE BOX 2447
RALEIGH, NC 27602
TELEPHONE 919/890-4190
FACSIMILE 919/890-4180

SPARTANBURG OFFICE
SPARTAN CENTRE/SUITE 306
101 WEST ST. JOHN STREET
POST OFFICE BOX 5137
SPARTANBURG, SC 29304
TELEPHONE 803/542-1300
FACSIMILE 803/522-0705

August 23, 1993

RECEIVED

AUG 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Motion to Enlarge Issues Against Wilburn."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:

John W. Hunter
John W. Hunter

By:

Stephen T. Yelverton
Stephen T. Yelverton

Enclosure

B:CATON.96

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

DAVID A. RINGER

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

MOTION TO ENLARGE ISSUES AGAINST WILBURN

MCNAIR & SANFORD, P.A.

By: Stephen T. Yelverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th Street, N.W., Suite 400
Washington, D.C. 20005
Telephone: (202) 659-3900

B: CATON.96

MOTION TO ENLARGE ISSUES AGAINST WILBURN

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.229 (b)(1) of the Commission's Rules, hereby submits this motion to enlarge the issues against Wilburn Industries, Inc. ("WII"). This motion is based on the deposition testimony of Charles W. Wilburn and Bernard P. Wilburn, the two shareholders of WII, and is filed within fifteen (15) days of receipt of the deposition transcripts. Thus, it is timely filed. In support of its motion to enlarge the issues, ORA submits the following comments.

Financial Qualifications Issue

At the time of certification, neither principal of WII prepared a written budget or cost estimates (CWW Dep. Tr. 21, 48-49). A written budget was not actually prepared until May 1993 (BPW Dep. Tr. 34-35). Moreover, at the time of certification, the principals of WII had not prepared or shown to each other their personal financial statements. See, attachment 1. However, Commission policy requires that an applicant prepare at the time of certification written documentation showing cost estimates for construction and the first three months of operation and to document the sources of funding to meet such estimates. See, Revision of FCC Form 301, 50 RR2d 381, 382 (1981); FCC Form 301 Instructions (1989-1992 version), Section III (D)(1)(b), pages 5-6; Revision of FCC Form 301, 4 FCC Rcd 3853, 3859-3860, paras. 43, 46, 49, 52 (1989).

Accordingly, the failure of WII to prepare written cost estimates and to document its sources of funding at the time of certification requires the specification of a financial qualifications issue. Las Americas Communications, Inc., 1 FCC Rcd 786, 788, para. 10 (Rev. Bd. 1986), written documentation is the sine qua non for financial qualifications. Northampton Media Associates, 4 FCC Rcd 5517, 5519, paras. 18-19 (1989), all applications filed on or after June 26, 1989, must have written documentation of their financial qualifications prepared at the time of certification.

EEO Abuse of Process Issue

The WII application, as filed on December 30, 1991, proposed to employ more than five full-time employees. See, attachment 2. However, no Equal Employment Opportunity ("EEO") program was submitted with the application at that time.

Charles Wilburn conceded at his deposition that it was not filed then because he did not have time to do it and in any event he did not know how to fill it out (CWW Dep. Tr. 18-19). The EEO program, which was eventually submitted by WII, was based entirely on the EEO programs of the competing applicants. Bernard Wilburn went to the Westerville public library and copied the information contained in the applications on file. No independent research or inquiry was made by WII in this respect (CWW Dep. Tr. 54-55).

Accordingly, an EEO abuse of process issue must be specified against WII. Charles Wilburn admitted that a required EEO program was knowingly and intentionally not filed by WII in its application because there was not enough time to do it and because he did not know how to fill it out. When the EEO program was eventually submitted, WII merely plagiarized the programs from the other applicants. Such a cavalier disregard for the Commission's filing requirements and for its EEO policies constitutes an egregious abuse of process. See, David Ortis Radio Corp. v. FCC, 941 F.2d 1253, 1261 (D.C. Cir. 1992), an abuse of process can take many varied forms. Here, WII's abusive intent has been admitted to on the record.

The Commission imposes stringent EEO requirements on broadcast licensees and considers a violation of these rules a serious breach of a licensee's responsibilities. See, e.g., Spectacor Broadcasting, L.P., FCC 93-395, rel. August 20, 1993. Based upon WII's past conduct, the Commission can not expect WII to take seriously its EEO obligations. Accordingly, it can not be entrusted as a steward of a valuable public trust.

The Presiding Judge is requested to specify the following issues:

(1) To determine whether Wilburn Industries, Inc. failed to prepare written cost estimates at the time of certification, whether it has available sufficient committed funds to cover its construction and first three months of operations, and whether it is financially qualified to be a Commission licensee, and thus whether its application should be granted?

(2) To determine whether Wilburn Industries, Inc. knowingly and intentionally failed to submit an Equal Employment Opportunity program in its December 30, 1991, application and thus whether it abused the Commission's processes, and if so, whether it possesses the requisite character and basic qualifications to be a Commission licensee, and thus whether its application should be granted?

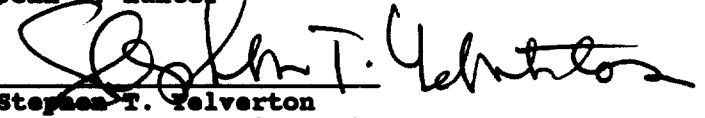
If these issues are specified, ORA requests that WII produce any documents related to its cost estimates which have not already been produced. This would include notes or drafts relating to its cost estimates, records of telephone conversations and facsimile transmissions relating to preparation of its cost estimates, and documents relating to the sources of information for the costs included in its estimates. ORA further requests that WII produce any similar documents related to its EEO program which have not already been produced.

WHEREFORE, in view of the foregoing, ORA requests that the foregoing issues be specified against WII.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 
John V. Hunter

By: 
Stephen T. Selverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th St., N.W., Suite 400
Washington, D.C. 20005
Telephone: 202-659-3900

August 23, 1993

020979.00001 ORA.71k

CHARLES W. WILBURN
Statement of Financial Position
January 31, 1992

ASSETS

Current

Checking Account, BancOhio	\$21,800.00
Certificates of Deposit, BancOhio	94,000.00
Certificates of Deposit, Bank One	43,000.00
Certificates of Deposit, State Savings Bank	<u>17,000.00</u>

Total Cash	\$175,800.00
------------	--------------

Accounts Receivable Weldon & Wilburn	<u>125,000.00*</u>
---	--------------------

TOTAL CURRENT ASSETS	\$300,800.00
----------------------	--------------

Fixed

Residential Real Estate 3324 Westbury Drive Upper Arlington, Ohio	\$185,000.00
---	--------------

Office Building 210 South Court Street Circleville, Ohio Undivided one-half	<u>75,000.00</u>	<u>\$260,000.00</u>
--	------------------	---------------------

TOTAL ASSETS	<u>\$560,800.00</u>
--------------	---------------------

LIABILITIES	-0-
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NET WORTH	<u>\$560,800.00</u>
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* Estimated. Actual fee received was \$230,000 per attorney.

BERNARD P. WILBURN
Statement of Financial Position
January 31, 1992

ASSETS

Current

Checking Account, Bank One	\$ 3,500.00
Savings Account, Bank One	<u>36,000.00</u>
Total Cash	\$39,500.00
Accounts Receivable Weldon and Wilburn	<u>\$125,000.00*</u>
TOTAL CURRENT ASSETS	\$164,500.00

Fixed

Duplex 1063 Pennsylvania Ave. Columbus, Ohio	\$85,000.00	
Duplex 1388 Virginia Avenue Columbus, Ohio	<u>105,000.00</u>	<u>\$190,000.00</u>
TOTAL ASSETS		<u>\$354,500.00</u>

LIABILITIES

Mortgage due Chemical Bank on 1063 Pennsylvania Ave	\$34,000.00**	
Mortgage due Huntington Nat'l Bank 1388 Virginia Avenue	<u>65,000.00***</u>	
Total Liabilities		<u>\$99,000.00</u>
NET WORTH		<u>\$255,500.00</u>

* Estimated. Actual fee received was \$230,000 per attorney.

** Monthly payment due was \$400.00. Expense was completely covered by monthly rental income from property. Mortgage has since been entirely paid off.

*** Monthly payment due is \$700.00. Expense is completely covered by monthly rental income from property.

FCC 300MELTON DEC 30 1991

DUPLICATE COPY

Attachment 2

Approved by OMB
3000-0027

Expires 2/28/92

See Page 25 for information
regarding public burden estimate

APPLICATION FOR CONSTRUCTION PERMIT FOR COMMERCIAL BROADCAST STATION

For COMMISSION Fee Use Only

FEE NO:

FEE TYPE:

FEE AMT:

ID SEQ:

For APPLICANT Fee Use Only

Is a fee submitted with this application?

☒ Yes ☐ No

If fee exempt (see 47 C.F.R. Section 1.1112),
Indicate reason therefor (check one box):

- ☐ Noncommercial educational licensee
☐ Governmental entity

FOR COMMISSION USE ONLY

BPH-911230 MC
FILE NO.

Section I - GENERAL INFORMATION

1. Name of Applicant

Wilburn Industries, Inc.

Send notices and communications to the following
person at the address below:

Name

Charles W. Wilburn or
Bernard P. Wilburn

Street Address or P.O. Box

210 South Court Street, P. O. Box 418

City

Circleville

State

Ohio

ZIP Code

43113

Telephone No. (Include Area Code)

(614) 474-2780

Street Address or P.O. Box

210 South Court Street, P. O. Box 418

City

Circleville

State

Ohio

ZIP Code

43113

Telephone No. (Include Area Code)

(614) 474-2780

2 This application is for:

☐

AM

☒

FM

☐

TV

(a) Channel No. or Frequency

103.9 F. M.

(b) Principal
Community

City

Westerville

State

Ohio

(c) Check one of the following boxes:

☒

Application for NEW station Note: This is a new station for Applicant, however station
is already constructed. See FCC-301 # BPH-790904AH

☐

MAJOR change in licensed facilities; call sign: _____

☐

MINOR change in licensed facilities; call sign: _____

☐

MAJOR modification of construction permit; call sign: _____

File No. of construction permit: _____

☐

MINOR modification of construction permit; call sign: _____

File No. of construction permit: _____

☐

AMENDMENT to pending application; Application file number: _____

NOTE: It is not necessary to use this form to amend a previously filed application. Should you do so, however, please
submit only Section I and those other portions of the form that contain the amended information.

3. Is this application mutually exclusive with a renewal application? See 2 (c) herein

☒

Yes

☐

No

If Yes, state:

Call letters

WBBY

Community of License

City

Westerville,

State

Ohio

Call letters map

same facilities proposed

P-2
SECTION VI - EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

1. Does the applicant propose to employ five or more full-time employees?

☒ Yes ☐ No

If Yes, the applicant must include an EEO program called for in the separate Broadcast Equal Employment Opportunity Program Report (FCC 896-A).

SECTION VII - CERTIFICATIONS

1. Has or will the applicant comply with the public notice requirement of 47 C.F.R. Section 73.3580?

☒ Yes ☐ No

2. Has the applicant reasonable assurance, in good faith, that the site or structure proposed in Section V of this form, as the location of its transmitting antenna, will be available to the applicant for the applicant's intended purpose? See Exhibit 2 Attached

☒ Yes ☐ No

Exhibit No.

If No, attach as an Exhibit, a full explanation.

3. If reasonable assurance is not based on applicant's ownership of the proposed site or structure, applicant certifies that it has obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure.

Name of Person Contacted

Carl B. Fry, Esq.

35 East Livingston Avenue, Columbus, Ohio 43215

Telephone No. (include area code)

(614) 228-2300

Person contacted: (check one box below)

☐ Owner

☒ Owner's Agent

☐ Other (specify)

The APPLICANT hereby waives any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 306 of the Communications Act of 1934, as amended.)

The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein.

The APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

In accordance with 47 C.F.R. Section 1.66, the APPLICANT has a continuing obligation to advise the Commission, through amendments, of any substantial and significant changes in information furnished.

COPY

Attachment 3

1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN RE APPLICATIONS OF: :
:MM Docket No.: 93-107
DAVID A. RINGER : BPH 911230MA
ASF BROADCASTING CORP. : BPH 911230MB
WILBURN INDUSTRIES, INC. : BPH 911230MC
KYONG JA MATCHAK : BPH 911230MF
SHELLEE F. DAVIS : BPH 911231MA
WESTERVILLE BROADCASTING CO.
LIMITED PARTNERSHIP : BPH 911231MB
OHIO RADIO ASSOCIATES, INC. : BPH 911231MC
:
For Construction Permit for :
an FM Station on Channel :
280A in Westerville, Ohio :

Washington, D.C.
Monday, July 12, 1993

Deposition of:

CHARLES W. WILBURN

called for oral examination by counsel for the
Applicant ASF Broadcasting, pursuant to notice, at the
offices of Brown, Nietert & Kaufman, Chartered, 1920 N
Street, Northwest, Suite 660, Washington, D.C., before
Shari R. Broussard, a Notary Public in and for the
District of Columbia, beginning at 9:55 a.m., when
were present on behalf of the respective parties:

1 managerial in the case of managing clients' accounts
2 and the like.

3 Q When you were preparing the application
4 and, in particular, the financial portion of it, on
5 what did you base your estimates?

6 A Well, as I mentioned previously, my
7 initial information came from Ardeth Frizzell, who
8 told me that at the time that the notice of taking the
9 license really came down they were spending about
10 30,000 a month in expenses. And that is the initial
11 information I came off of. And I upgraded that to
12 what I felt it should be and then determined what
13 three months' operating cost would be.

14 Q When you spoke with Ardeth Frizzell about
15 this \$30,000 a month in expenses, did she give you any
16 breakdown of the expenses?

17 A No, she did not, but later I got a much
18 clearer breakdown from a Terry Wilson, who had been
19 program director at the station.

20 Q When you say "later," what does that mean?

21 A Well, like about a year later.

22 Q Did Ardeth Frizzell indicate when you

1 A About a month later.

2 Q After the --

3 A Yeah, but it was the same as what I had
4 budgeted in my head.

5 Q Well, when you say the same --

6 A Pretty much the same. I mean the figures
7 did not vary.

8 Q Let me continue on this budget. This
9 budget that was reduced to writing, do you have that?

10 A Not with me, but I have it, yes.

11 Q Is it typewritten?

12 A No, it is in my handwriting.

13 Q Are there any other written materials that
14 you have that you used to prepare that budget? In
15 other words, as far as --

16 A No, I don't think so.

17 Q Mr. Wilson provided you certain
18 information regarding the operational expenses of the
19 radio station?

20 A Uh-huh.

21 Q Did any of the information Mr. Wilson
22 provide you come in written form?

1 A No, no, it was all verbal.

2 Q Did you take notes of your conversations
3 with Mr. Wilson?

4 A Yes.

5 Q Do those notes exist?

6 A Well, the only notes I took were the
7 positions that we -- what it would probably cost and
8 the other operating expenses and so forth. It is all
9 in my handwriting.

10 Q Do you still have those?

11 A Yes, I have them.

12 MR. McCORMICK: Counsel, will you produce
13 them?

14 MR. KRAVETZ: What is the basis for the
15 request?

16 MR. McCORMICK: It would fall under
17 standard document production request 12.

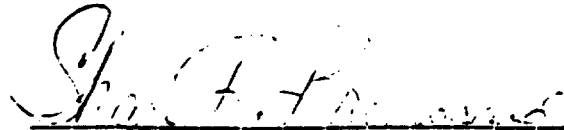
18 MR. KRAVETZ: I will take a look at the
19 request and if it does, I will produce it. If I
20 differ with you, I will let you know.

21 MR. McCORMICK: I appreciate it.

22 BY MR. McCORMICK:

CERTIFICATE OF NOTARY PUBLIC

I, SHARI R. BROUSSARD, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotypy and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



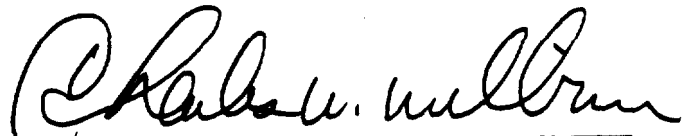
SHARI R. BROUSSARD
Notary Public in and for
the District of Columbia

My commission expires:
June 30, 1995

1 CERTIFICATE FOR READING AND SIGNING

2 I hereby certify that I have read and
3 examined the within transcript and the same is a true
4 and accurate record of the testimony given by me.

5 Any corrections I have listed on the
6 separate errata sheet enclosed, indicating the page
7 and line number of each correction.

8
9 
10 CHARLES W. WILBURN

11
12 August 5, 1893
13 DATE

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COPY

Attachment 4

1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN RE APPLICATIONS OF: :
:MM Docket No.: 93-107
DAVID A. RINGER : BPH 911230MA
ASF BROADCASTING CORP. : BPH 911230MB
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:
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an FM Station on Channel :
280A in Westerville, Ohio :

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Monday, July 12, 1993

Deposition of:

BERNARD P. WILBURN

called for oral examination by counsel for the
Applicant ASF Broadcasting, pursuant to notice, at the
offices of Brown, Nietert & Kaufman, Chartered, 1920 N
Street, Northwest, Suite 660, Washington, D.C., before
Shari R. Broussard, a Notary Public in and for the
District of Columbia, beginning at 11:30 a.m., when
were present on behalf of the respective parties:

1 Q Do you know if anyone else did?

2 A There is no other -- no, nothing in
3 writing. I believe that my father spoke to Ardeth
4 when he was obtaining information and asked her what
5 the operating costs were at the time.

6 Q To the best of your knowledge when did
7 that discussion take place?

8 A That was prior to the application.

9 Q Just so it is clear, neither you nor your
10 father, to the best of your knowledge, wrote down any
11 estimates of what it would cost to operate the radio
12 station?

13 A No, none. It was a pretty simple figure.

14 Q To your knowledge has a written budget
15 subsequently been prepared?

16 A I think there is some notes.

17 Q Who prepared those notes?

18 A Those are prepared by my father.

19 Q Have you seen these notes?

20 A I have seen them, yes.

21 Q When did you see them?

22 A I saw them -- I think the first time I saw

1 them was in June.

2 Q Of what year?

3 A Of this year.

4 Q Of 1993?

5 A Yes.

6 Q So very relatively recently?

7 A Right.

8 Q Do you know when the notes were created?

9 A I think they were created in May.

10 Q Of 1993?

11 A Yes.

12 Q To your knowledge what were the notes
13 based upon? Are they based upon information from some
14 third person?

15 A Yeah, I think they are based upon
16 information from Terry Wilson.

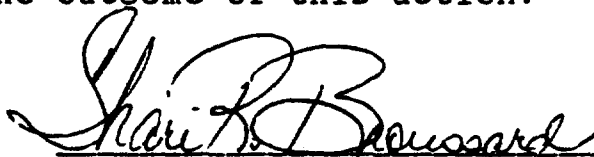
17 Q Now, did you and your father in
18 approximately May or the Spring of 1993 participate
19 in --

20 A My father did in a meeting with Terry
21 Wilson. I am anticipating your question. I'm sorry.

22 Q It is all right. It is understandable.

CERTIFICATE OF NOTARY PUBLIC

I, SHARI R. BROUSSARD, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotypy and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



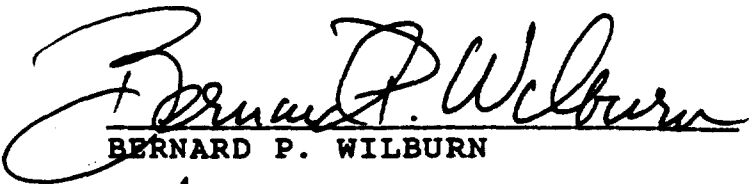
SHARI R. BROUSSARD
Notary Public in and for
the District of Columbia

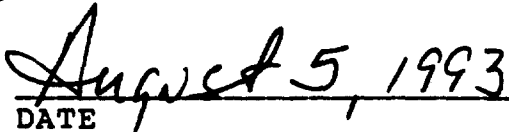
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4 and accurate record of the testimony given by me.

5 Any corrections I have listed on the
6 separate errata sheet enclosed, indicating the page
7 and line number of each correction.

8
9
10 
11 BERNARD P. WILBURN

12 
13 DATE

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 23rd day of August, 1993, I have caused to be hand delivered, or mailed, U.S. mail, first class, postage prepaid, a copy of the foregoing "Motion to Enlarge Issues Against Wilburn" to the following:

The Honorable Walter C. Miller*
Administrative Law Judge
Federal Communications Commission
Room 213
2000 L Street, N.W.
Washington, D.C. 20554

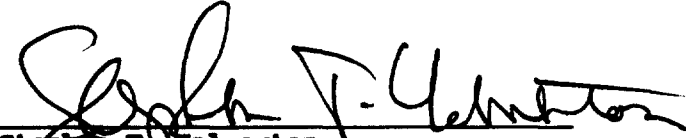
James Shook, Esquire
Hearing Branch
Federal Communications Commission
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

Arthur V. Belenduiik, Esquire
Smithwick & Belenduiik, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036
Counsel for David A. Ringer

James A. Koerner, Esquire
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
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Washington, D.C. 20015-2003
Counsel for ASF Broadcasting Corp.

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Brown, Finn & Nietert, Chartered
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Suite 660
Washington, D.C. 20036
Counsel for Wilburn Industries, Inc.

Dan J. Alpert, Esquire
Law Office of Dan J. Alpert
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Shellee F. Davis


Stephen T. Yelverton

*Hand Delivery